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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 MARIA POLANCO,) Case No. CV 08-5550 PJW
11 Plaintiff,)
12 v.) MEMORANDUM OPINION AND ORDER
13 MICHAEL J. ASTRUE,)
14 Commissioner of the)
15 Social Security Administration,)
16 Defendant.)
17

18 I.

19 INTRODUCTION

20 Plaintiff appeals a decision by Defendant Social Security
21 Administration ("the Agency"), denying her applications for Disability
22 Insurance Benefits ("DIB") and Supplemental Security Income ("SSI").
23 She claims that the Administrative Law Judge ("ALJ") erred when she
24 ignored the functional assessment of treating physician Sean Leoni and
25 when she found that Plaintiff was not credible. (Joint Stip. at 4,
26 10.) For the reasons discussed below, the Agency's decision is
27 REVERSED and the case is REMANDED for further proceedings.
28

II.

SUMMARY OF PROCEEDINGS

On April 1, 2004, Plaintiff protectively filed for DIB and SSI. (Administrative Record ("AR") 61-63.) After the Agency denied the applications initially and on reconsideration, she requested and was granted an administrative hearing. (AR 48-60.) On January 22, 2007, Plaintiff appeared with counsel at the hearing and testified. (AR 435-71.) On February 6, 2007, the ALJ issued a decision denying her applications. (AR 13-20.) On July 3, 2008, the Appeals Council denied Plaintiff's request for review. (AR 6-8.) Plaintiff then commenced this action.

III.

ANALYSIS

1. The ALJ's Failure to Consider the Treating Doctor's Opinion

In her first claim of error, Plaintiff contends that the ALJ's failure to provide any reasons, let alone specific and legitimate ones, for rejecting a treating doctor's opinion compels remand. (Joint Stip. at 5-7.) For the following reasons, the Court agrees.

An ALJ is required to take into account a treating doctor's opinion in formulating her decision as to whether a claimant is disabled. In order to reject a treating doctor's opinion that is contradicted by another doctor's opinion, the ALJ must provide "specific and legitimate" reasons for doing so. *See Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995).

Dr. Sean Leoni, an internist, was one of Plaintiff's treating doctors. He saw her eight times between September 2002 and April 2004, each time preparing and submitting reports for Plaintiff's

1 Worker's Compensation case. (AR 206-45.) Dr. Leoni diagnosed a
2 number of impairments during this period, including hypertension,
3 morbid obesity, gastroesophageal reflux disease, irritable bowel
4 syndrome, and an orthopedic condition. (AR 242.) He believed that
5 Plaintiff's reflux disease and irritable bowel syndrome had been
6 "aggravated, accelerated, and lit up" by stress from work and
7 concluded in September 2002 that she was totally temporarily disabled.
8 (AR 244-45.)

9 In his final report in April 2004, Dr. Leoni determined that
10 Plaintiff's disabling reaction to emotional stress meant that she
11 should avoid contact with the public or fellow workers, as well as
12 jobs giving rise to stressful situations, such as those involving
13 deadlines, exasperating members of the public, precision, and
14 attention to detail. (AR 212.) Dr. Leoni also opined that Plaintiff
15 should have access to a bathroom and should avoid heavy work. (AR
16 212.)

17 The ALJ determined that Plaintiff could perform light work, with
18 "occasional postural activities," meaning, consistent with the
19 vocational expert's testimony, that Plaintiff could perform her past
20 work as a teacher's aide and as a program director. (AR 18, 19.) The
21 ALJ did not mention Dr. Leoni at all or explain how, despite Dr.
22 Leoni's findings, Plaintiff was still capable of working as a
23 teacher's aide or program director. This was error. The ALJ was not
24 allowed to disregard Dr. Leoni's opinion without providing reasons for
25 doing so. See *Orn* 495 F.3d at 632 ("Even if the treating doctor's
26 opinion is contradicted by another doctor, the ALJ may not reject this
27 opinion without providing 'specific and legitimate reasons' supported
28 by substantial evidence in the record.")

1 The Agency argues that the error was harmless under *Stout v.*
2 *Comm. Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006). (Joint
3 Stip. at 8-9.) It offers its interpretation of the evidence and
4 argues that, since there were several possible interpretations of the
5 evidence, the ALJ's interpretation should be upheld, citing *Sandgathe*
6 *v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997). (Joint Stip. at 9.)

7 The Agency clearly misses the mark here. The ALJ did not provide
8 a different interpretation of Dr. Leoni's submissions--she provided no
9 interpretation. Based on a review of the four corners of the ALJ's
10 decision, it is not clear whether she ever even read Dr. Leoni's
11 reports, never mind considered them in her decision. And the issue
12 here is not one involving lay testimony--which, although competent
13 evidence, does not typically drive a disability determination--as in
14 *Stout*. The ALJ's oversight in this case was the treating doctor's
15 opinion. As the Agency knows, the treating doctor's opinion, all
16 other things being equal, is entitled to deference and often dictates
17 the outcome of a case. For these reasons, the Court concludes that
18 the ALJ's error was not harmless. The Court will not, however, grant
19 Plaintiff's request to credit the treating doctor's opinion and order
20 the Agency to award benefits. Remand for an award of benefits is only
21 warranted in this context where the ALJ failed to provide adequate
22 reasons for rejecting the evidence, there are no outstanding issues
23 that need to be resolved, and it is clear that claimant is entitled to
24 relief. See *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996.)
25 Plaintiff has not met this standard. As such, the case will be
26 remanded for further proceedings.

1 2. The ALJ's Credibility Determination

2 In her second claim of error, Plaintiff contends that the ALJ
3 failed to provide legally sufficient reasons for concluding that she
4 was not credible. (Joint Stip. at 10-17.) For the following reasons,
5 the Court finds that remand is warranted on this issue as well.

6 ALJ's are tasked with judging the credibility of witnesses. In
7 making a credibility determination, an ALJ may take into account
8 ordinary credibility evaluation techniques. *Smolen*, 80 F.3d at 1284.
9 Where, as here, a claimant has produced objective medical evidence of
10 an impairment which could reasonably be expected to produce the
11 symptoms alleged and there is no evidence of malingering, the ALJ can
12 only reject the claimant's testimony for specific, clear, and
13 convincing reasons. *Id.* at 1283-84. In making a credibility
14 determination, the ALJ may take into account, among other things,
15 ordinary credibility evaluation techniques and the claimant's daily
16 activities. *Id.* at 1284.

17 Plaintiff testified that she could not sit for more than 15
18 minutes or stand for longer than ten or 15 minutes at a time. (AR
19 446.) She also testified that she could not walk more than two or
20 three blocks and that, after, she would have to lie down for about 15
21 minutes to rest. (AR 446-48.) Plaintiff explained that she had a lot
22 of pain in her neck and back and that her leg gave way when she
23 walked. (AR 443.) She complained of numbness in both hands and back
24 and knee pain, despite several surgeries. (AR 444-45.) She testified
25 that she could fix a simple meal, bathe, and dress herself, but that
26 she could not bend over. (AR 448.) She reported that her doctors
27 could not put her on pain medication because it affected her blood
28 pressure and acid reflux. (AR 449.)

1 The ALJ noted Plaintiff's allegations but determined that they
2 were inconsistent with the objective medical evidence. (AR 18.) She
3 offered four reasons supporting her decision that Plaintiff was not
4 credible: 1) Plaintiff had been advised to maintain a gym membership
5 with the goal of weight control, suggesting that she was "capable of
6 maintaining some level of physical activity on a sustained basis";
7 2) Plaintiff had stopped taking Vicodin to control her pain;
8 3) Plaintiff did not receive treatment for her condition after July
9 2005; and 4) an MRI of the lumbar spine in 2004 "revealed no recurrent
10 canal stenosis, a mild disc protrusion with no significant compromise
11 of the neural elements, and no neural impingement or compromise." (AR
12 18.) As explained below, the credibility issue needs further
13 development.

14 The fact that Plaintiff's doctor recommended that she join a gym
15 and work towards losing weight does not undermine Plaintiff's
16 testimony that she was incapable of working due to pain. Plaintiff is
17 5'-1" tall and weighed between 170 and 200 pounds during most of the
18 time covered by her medical records. (AR 126.) It is hard for the
19 Court to imagine that any doctor would not recommend that Plaintiff
20 lose weight. Further, there is no evidence that Plaintiff ever joined
21 a gym or that she ever exercised. Thus, the fact that her doctor
22 wanted her to exercise and lose weight--and believed that she could--
23 not undermine Plaintiff's testimony that she was in too much pain to
24 work.

25 The ALJ's second reason for discounting Plaintiff's testimony--
26 that she stopped using Vicodin to treat it--is equally unpersuasive.
27 Though, in general, a failure to take pain medication to treat
28 excessive pain is a legitimate reason for discounting a claimant's

1 testimony, *see, e.g., Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th Cir.
2 1999), here, Plaintiff testified that the medication "interfered with"
3 her blood pressure and acid reflux and made her groggy. (AR 449,
4 451.) The ALJ failed to address these explanations for discontinuing
5 Vicodin. And there is no evidence in the record to contradict them.
6 For this reason, the Court cannot conclude that the ALJ's finding that
7 Plaintiff was exaggerating her claims of pain because she stopped
8 taking Vicodin is supported by the record.

9 The ALJ's third reason for rejecting Plaintiff's testimony was
10 that she was not receiving medical care in July 2005. (AR 18.) This
11 is a proper reason for questioning a claimant's pain testimony. *See*
12 *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). And it is
13 supported by the record. Though Plaintiff was seen for routine
14 medical check-ups in 2005, she did not receive care for her pain and
15 other alleged conditions from 2005-on. (AR 343, 367-83.)

16 The ALJ's fourth reason for questioning Plaintiff's testimony was
17 that an MRI of the lumbar spine in 2004 "revealed no recurrent canal
18 stenosis, a mild disc protrusion with no significant compromise of the
19 neural elements, and no neural impingement or compromise." (AR 18.)
20 The Court rejects this reason also. The ALJ had previously found that
21 Plaintiff had medically determinable impairments which could be
22 expected to produce some functional limitations. (AR 18.) Having
23 done so, she was not permitted to reject Plaintiff's testimony on the
24 basis that Plaintiff did not have a specified ailment--such as canal
25 stenosis, "compromise of neural elements," or "neural impingement or
26 compromise"--that would support her pain allegations. In appearing to
27 require such evidence, the ALJ was impermissibly substituting her own
28 medical opinion for that of the physicians of record, which is

1 prohibited. See *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir.
2 1975); *Arquette v. Astrue*, 2010 WL 4916603, at *4 (C.D. Cal. Nov. 24,
3 2010).

4 In the end, of the four reasons relied on by the ALJ for finding
5 that Plaintiff was not credible, only one of them is valid on its
6 face, i.e., the fact that Plaintiff did not receive treatment for her
7 alleged condition after July 2005. Though the Court finds this reason
8 to be strong support for the ALJ's credibility determination, it is
9 not clear to the Court whether the ALJ would have found Plaintiff not
10 credible for this reason alone. See *Carmickle v. Comm'r Soc. Sec.*
11 *Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008) (noting that the "relevant
12 inquiry . . . is whether the ALJ's decision remains legally valid,"
13 despite errors in the credibility analysis). As such, remand is
14 required on this issue as well. On remand, the ALJ should reconsider
15 the credibility determination. In doing so, she is not limited in her
16 analysis and may consider any factors she deems relevant in
17 determining credibility.¹

26 ¹ Plaintiff's request that the case be reversed and remanded for
27 the payment of benefits is denied. As the Court has already made
28 clear, Plaintiff has not established her entitlement to benefits.
Further, there are issues of fact that need to be addressed concerning
Plaintiff's credibility.

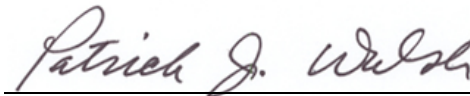
IV.

CONCLUSION

For these reasons, the Agency's decision is reversed and the case is remanded for further proceedings consistent with this memorandum opinion and order.

IT IS SO ORDERED.

DATED: January 13, 2011.



PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE